

The Briefing Service for the International Business Lawyer

International Construction Contracts

France: Engineer's Liability to the Owner for Defects in a Construction Project

Engineers involved in construction projects in France face greater potential liability to owners as a result of changes in recent years both in French law and in the role assumed by engineers in such projects.

Increasingly, engineers, rather than architects, are acting as project managers or, more precisely, as *maitres d'oeuvre*, which normally entails responsibility for the design of construction works and the management and supervision of their execution. The nature of the engineer's liability to the owner differs depending upon whether the engineer has acted as *maitre d'oeuvre* and whether the liability arises before or after completion of the works.

Before completion, the engineer's liability to the owner will ordinarily be governed by the terms of his contract and general contract principles. However, when an engineer acts as *maitre d'oeuvre*, he may, in addition, be considered as a kind of guarantor of the project. Specifically, he may be presumed liable for any defects that arise in the project before completion, unless he can prove the defects were the responsibility of another party or attributable to *force majeure*. This presumption is consistent with the tendency in French law to impose a form of collective liability on builders generally, and on the *maitre d'oeuvre* in particular.

Once the works are completed and have been accepted by the owner, the engineer's contractual obligations ordinarily come to an end. Thereafter, the engineer may be subject to a statutory system of strict decennial liability to the owner. Originally applicable to architects and contractors, strict decennial liability now extends equally to engineers who contract directly with the owner. Under

the present Article 1792 of the French Civil Code, such engineers are presumed liable to the owner for any damages that impair the security of the work or make it unsuitable for its purpose, so long as the underlying defects were not visible when the work was accepted. This form of strict liability may be particularly harsh for the engineer whose duties were limited to design and/or supervision, since he may be made jointly and severally liable, together with others participating in a building project, for the full amount of the damages. Here again, the engineer can escape liability only by proving that the damages were the responsibility of another party or attributable to *force majeure*. Article 2270 of the Civil Code relieves builders of the presumption of liability ten years after the completion of the works. Thus, the damage must occur, and the owner or his successors must bring legal action, within this ten-year period.

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International Franchising

Australia

Under the Uniform Companies Code of each of the Australian States, offers of interests or rights to participate in franchising schemes which are made to the public (eg, seeking franchises through advertisements) must comply with Division 6 of Part IV of that Code. This requires the franchisor:

- to be a public company (Section 169);
- to enter in an approved trust deed (Section 171);
- to appoint an approved trustee (Section 165); and
- to register a statement and otherwise comply with the provisions relating to prospectuses and the

public offering of shares (Section 170).

Such offers also fall within the scope of the Uniform Securities Industry Code of each of the Australian States. Accordingly, under that Code a franchisor is required to hold a dealer's licence. For more details of these requirements refer to *Survey of Foreign Laws Affecting International Franchising* (Australia, pp 8-15).

The requirements of the Uniform Companies Code and the Securities Industry Code are onerous and not entirely suited for franchises. The National Companies Securities Commission ('NCSC') is the body which administers both Codes through the Corporate Affairs Commission in each State. It has power to grant exemptions from some or all of the requirements. Until recently the NCSC exercised its discretion on a case by case basis. As a consequence there was some uncertainty on the granting of exemptions and considerable time delays were experienced by franchisors in complying with the onerous requirements.

On 29 August 1983 the NCSC issued Policy Statement 118 which sets out the NCSC's guidelines on franchising schemes which are offered to the public.

Broadly the NCSC will exempt a franchisor from the requirements of an approved trust deed and an approved trustee if he enters into a written contract with the franchisee and the agreement contains certain terms. The more important of those terms are that the franchisor:

- will pay all moneys received from the franchisee into a bank trust account pending expenditure for the purposes for which the moneys were paid;
- will maintain a trust ledger for each franchisee showing amounts paid and received and allow the franchisee access to the accounts and give the franchisee other oral or written information relating to the franchise;
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